UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the Matter of:

GOMOLAK, DENISE M.,

Debtor.
_______________________/

In Bankruptcy

Case No. 14-41137 PJS
Chapter 7
Hon. Phillip J. Shefferly

TRUSTEE'S OBJECTION TO
DEBTOR'S AMENDED EXEMPTIONS

The Trustee, Timothy J. Miller, by his attorneys Schneider Miller, P.C., objects to the Debtors' Amended Exemptions, which were filed after the case was closed and later reopened.

In support of his Objection, the Trustee relies on the Brief in Support of Trustee's Objection to Debtor's Amended Exemptions filed concurrently with this Motion.

WHEREFORE the Trustee prays for entry of an order sustaining the Trustee's Objection to the Debtor's Amended Exemption, and striking the Debtor's Amended Exemption from the record.

Dated: November 10, 2016

/s/Timothy J. Miller, attorney
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
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In the Matter of:	In Bankruptcy
GOMOLAK, DENISE M.,	Case No. 14-41137 PJS Chapter 7
Debtor(s) _______________________/	Hon. Phillip J. Shefferly

BRIEF IN SUPPORT OF
TRUSTEE'S OBJECTION TO DEBTOR'S AMENDED EXEMPTIONS

Timothy J. Miller, Trustee, by and through his counsel, Schneider Miller, P.C., states as follows for his Brief in Support of Trustee's Objection to Debtor's Amended Exemptions:

Statement of Facts and Procedural Posture

On January 28, 2014 Denise Gomolak filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code.

Timothy J. Miller was duly appointed Trustee of the Debtor's bankruptcy estate.

The Debtor's section 341 meeting of creditors was held The Trustee retained a copy fo the recording. Debtor was asked whether or not she was in a lawsuit against anyone where she was a plaintiff, and the Debtor answered "No". The Debtor was asked whether or not she believed that she had any lawsuits against anyone, and the Debtor answered "No". The Debtor testified that she was unable to work due to her back, that it was not a work related condition, that she was on social security disability, and that there was no lump sum to be paid to her in the future.

The Trustee thereafter filed his no distribution report. The bankruptcy case was closed on by the court's final decree June 27, 2014.

On or about July 20, 2016, the Trustee was notified of a pending settlement of claim related to a defective pelvic mesh product and medical procedures in which the Debtor suffered legally compensable damages.

The Trustee received on July 20, 2016 an email which stated in part:

> *"The above referenced claimant/debtor has been offered a Mesh litigation settlement award in the amount of $240,000.00 (gross). We are the settlement fund administrators and prior to disbursement of the funds we need bankruptcy clearance in this case. We are contacting you as the former trustee to determine whether or not you claim these funds as part of the bankruptcy estate and if you intend to have the case reopened to administer these funds…."*

(See Exhibit 4, July 20, 2016 email from The Settlement Alliance).

The email contained an attached letter that referenced two prepetition implant procedure dates, three prepetition surgery dates, and a prepetition retention of counsel date, specifically June 28, 2012. The "reference" portion of the letter states as follows:

> *RE: Debtor: Denise Gomolak*
> *RID: 8526*
> *Product Implant date: 06/27/2005, 09/01/2005*
> *Surgery date(s): 07/11/2005, 09/01/2005, 06/03/2013*
> *Date Counsel Retained: 06/28/2012*
> *Bankruptcy Case No.: 14-41137*
> *Gross Award: $240,000.00*

(See Exhibit 5, July 20, 2016 letter with email from The Settlement Alliance).

The Trustee further learned that the Debtor had and has claims against a medical device company for physical injuries suffered by the Debtor as a result of a pelvic mesh product. The Debtor did not list her medical injury claim as an asset on her bankruptcy schedules. The Debtor did not disclose the retention of counsel in her statement of financial affairs. The Debtor testified falsely at the section 341 meeting of creditors with respect to claims being pursued or which may be pursued against third parties.

The Trustee filed a motion to reopen this case on July 26, 2016. Notice was provided to Debtor's counsel. The case was reopened by order dated July 27, 2016. There was no request that the order reopening the case be vacated.

Since the case was reopened, the Trustee took steps to administer the claim. The Trustee employed special counsel. The Trustee has been communicating with counsel and other individuals involved in the litigation. The Trustee filed a notice with the court prompting the clerk's office to notify creditors that they may file claims. To date, claims totaling $87,812.61 have been filed. The deadline for claims to be considered timely filed was October 26, 2016.

Approximately three months after the case was reopened, the Debtor filed on October 17, 2016 a cover sheet and amended schedules which included for the first time an item at Schedule B, paragraph 34 which states the following:

> *"Possible personal injury lawsuit against American Medical Systems, Inc., and Endo Pharmaceuticals, Inc. (collectively "AMS"), the manufacturer of a transvaginal mesh or bladder sling product implanted in the debtor's body. [value] $136,800.00"*

Amended Schedule C is also included in the amended schedules, which asserts exemptions for the same asset under 11 USC §522(d)(11)(D) in the amount of $22,974.00 and under 11 USC §522(d)(5) in the amount of $7,542.00.

The Debtor did not file a motion seeking entry of an order allowing the filing of amended exemptions. The Trustee alerted Debtor's counsel to the position to be taken, specifically that a motion must be filed and an order granting the motion must be entered to allow the filing of amended schedules. No response to the Trustee's communication was received.

Argument

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §157(b)(1), (b)(2)(A) and 18 U.S.C. §1334. Bankruptcy Code statutes applicable to this matter include 28 U.S.C §157(b)(2)(A), Fed. R. Bankr. P. 1009(a), 4003(b)(2) and Fed. R. Bankr. P. 9006(b)(1).

I. The Debtor Has No Right to Amend Her Schedules Under Fed. R. Bankr. P. 1009 Especially Where She Has Not Shown "Excusable Neglect".

Fed. R. Bankr. P. 1009(a) states in pertinent part: "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time *before the case is closed*." (emphasis added).

The Bankruptcy Court in Northern Indiana takes the position that once a case is closed, there is no longer an estate from which exemptions could be claimed. In the case of *In re Barlett,* the debtors failed to claim an exemption in their real property before the case closed, despite "every opportunity" to do so. The Court remarked that although cases may be opened under 11 U.S.C. §350, such reopening is "not the equivalent of a rewind button which allows one to return to the date of closing, replay the tape and, in the process of doing so, rewrite the script to pretend that certain things never happened." *In re Barlett,* 326 B.R. 436, 441 (Bankr. N.D.Ind. 2005), *citing In re Menk*, 241 B.R. 896, 913 (9th Cir. BAP 1999). The Court ultimately held that Rule 1009(a) requires that amendments be filed to a debtor's schedules before the case is closed. The Court denied the motion to reopen the case in order to file amended schedules. *Id.* at 441.

More often, courts use the "excusable neglect" standard when ruling to allow or deny post-case-closing amendments. Fed R. Bankr. P. 9006(b)(1) states in pertinent part: "[T]he court for cause shown may [...] order the period [to amend] enlarged […] where the failure to act was the result of *excusable neglect*." (emphasis added).

The Eastern District of Virginia Bankruptcy Court denied the Debtor's exemption under Va. Code Ann. §34-28.1 for and unscheduled personal injury action because he did not provide excusable reason why cause of action was not listed while his bankruptcy case was open; under Fed. R. Bankr .P. 1009 and 9006, and debtor did not have right as matter of course to amend his schedules after case was closed, and he was responsible for full disclosure on schedules under 11 U.S.C. §521. *In re Wilmoth,* 412 B.R. 791 (Bankr. E.D. Va. 2009).

Other courts have ruled similarly. "While the ability to amend as a matter of right under Rule 1009(a) ends when the case is closed, a court may in its discretion allow amendment after reopening under Rule 9006(b)(1), if the debtor establishes "cause," by demonstrating excusable neglect." *Moretti v. Bergeron,* *(In re Moretti),* 260 B.R. 602,607-08 (1st. Cir. BAP 2001); *In re Poulette,* 493 B. R. 729,733-34 (Bankr. D. Md. 2013).

In the case at hand, the Debtor failed to notify the Trustee of the cause of action, despite having retained a law firm to pursue the claim prior to the bankruptcy filing. In addition, there was a surgery after having retained counsel and within one year of the bankruptcy filing. Based upon information learned by the Trustee in the investigation of similar claims in other cases, the surgery may have been prompted to correct damage caused by the defective mesh product. The Debtor failed to list the cause of action as a potential asset. The case closed, and as a result the Debtor should be barred from filing amendments. The filed amendments should be stricken under Fed R. Bankr. P. 1009(a).

The Debtor has made no showing of "excusable neglect". The Debtor has not moved for an extension of time to file amendments, nor has the Court granted *sua sponte* any extension. With no showing of "excusable neglect" and indeed no existing extension of time to file amendments under Fed. R. Bankr. P. 9006(b)(1), the Debtor should be barred from filing amendments and her amendments should be stricken.

II. Detrimental Reliance and Prejudice Would Befall the Trustee If the Debtor Were Allowed to Amend Her Schedules.

This Court has previously denied a debtor's amendments where creditors would be prejudiced by such amendments. *See In re Lundy,* 216 B.R. 609 (Bankr. E.D. Mich. 1998); *Gold v. Guttman (In re Guttman),* 237 B.R. 643 (Bankr. E.D. Mich. 1999); *In re Daniels,* 270 B.R. 417 (Bankr. E.D. Mich. 2001).

The Bankruptcy Court for the Eastern District of Michigan, in *In re Daniels*, denied a debtor's late amendments where the Trustee and creditors were prejudiced. In *Daniels,* the debtors claimed an amended exemption against a personal injury action they had previously exempted under 11 U.S.C. § 522(d)(11)(D) and (d)(5), but gave no value. The Trustee objected to the initial exemption, which the court sustained. After the Trustee settled the personal injury suit, the debtors filed their amended claim of exemption in the proceeds. The Court denied the amendment on several grounds, including prejudice to the Trustee.

The Court in *Daniels* stated that "bad faith on the part of the debtor *or prejudice to creditors* are grounds justifying a bankruptcy court's disallowance of a debtor's amended claim of exemption upon a timely filed objection to it." *Id., citing Gold v. Guttman.* The Court further cited a Florida case to explain the type of prejudice that must be shown in order to deny a debtor's amended claim of exemptions:

> In determining whether to deny an amendment to schedules on the basis of prejudice, the focus is on the effect of allowing the amendment upon creditors and other parties in interest. Mere delay in filing an amendment, or the fact that an amendment if allowed will result in the exemption being granted, are not sufficient to show prejudice [...] Prejudice may be established by showing harm to the litigating posture of parties in interest. If the parties would have taken different actions or asserted different positions and the exemption been claimed earlier, and the interests of those parties are detrimentally affected by the timing of the amendment, then the prejudice is sufficient to deny amendment. Moreover, an amendment is prejudicial if it impairs a trustee in the diligent administration of the estate. *In re Talmo,* 185 B.R. 637, 645 (Bankr.S.D.Fla.1995).

As indicated in *Daniels*, the court should deny the amendment if the exemption: (1) if the parties would have taken different actions had the exemption been claimed earlier; (2) the interest of the parties are detrimentally affected by the timing of the amendment. Moreover, the court should focus on whether it impairs a trustee in diligent administration of the estate.

In the present case, creditors and the Trustee would be substantially prejudiced if the Debtor's amended exemptions were allowed to stand. The Trustee has relied on the Debtor's schedules in pursuing the asset at issue. The Debtor did not object to her case being reopened and did not object to the employment of the Trustee's special counsel. Thus the Trustee has incurred administrative expenses in administering the asset that the Debtor seeks to exempt. The Debtor should not be allowed to reap a windfall that would otherwise not have been obtained absent the Trustee's efforts.

III. The Debtor Should Not Be Allowed to Amend Because of the Doctrine of Laches.

The doctrine of laches applies in a case where a party is prejudiced by the lack of diligence of another. The laches doctrine applies in this case as the Debtor has arrived too late to now claim an exemption. If the Debtor were allowed to amend her schedules, the Estate would be prejudiced by the Debtor's lack of diligence.

The Bankruptcy Court for the Eastern District of Michigan addressed the laches doctrine in *Shapiro v. First Franklin Corp., et al.* (*In Re Rechis*), 339 B.R. 643 (Bankr. E.D. Mich. 2006). In *Rechis*, the debtor delayed 18 months in filing amendments to her schedules. The debtor wished to amend to state exemptions so that she could exempt the entire value of her home under state entireties exemption. During the 18 months prior to the proposed amendments, the trustee had spent time and effort in a preferential transfer case in order to recover the value in the debtor's property. The trustee in *Rechis* stated that he would not have put the effort into such litigation had the Debtor timely filed amended schedules claiming the entireties exemption.

Chief Judge Rhodes sustained the objections to the debtor's amended exemptions based on the doctrine of laches. In particular, the *Rechis* case set forth the following analysis, which "requires proof of: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Rechis*, 339 B.R. at 645.

Like in *Rechis*, the Debtor's lack of diligence in claiming an exemption should not be allowed to prejudice the Trustee. Because the Debtor failed to diligently claim her exemption as she would like to now, she should not be allowed to gain a windfall based on the Trustee's efforts.

It is the position of the Trustee that precedential case law controlling at the time of the bankruptcy filing, specifically the Sixth Circuit's ruling in *Lucius v McLemore*, 741 F2d 125 (6^{th} Cir. 1984), further prohibits the exemption, for the reason that failure to disclose the cause of action given the totality of circumstances amounts to bad faith.

CONCLUSION

Under Fed. R. Bankr. P. 1009, Debtor has no right to amend her schedules after her case has closed, and has failed to make any showing of "excusable neglect" that would allow her an exemption to the rule. Because the Trustee relied on the Debtor's schedules as filed, he has incurred expenses in recovering the asset at issue in this case. This Court has developed a jurisprudential policy of denying a Debtor's late amendments were it can be shown that prejudice would befall the Trustee and creditors if the amendment were to be allowed. The judicial doctrine of laches bars the Debtor from amending exemptions where she has lacked diligence in asserting her rights, directly prejudicing the Trustee. Bad faith further bars amended exemptions. For the reasons stated above, the court may deny the Debtor's amended exemptions.

WHEREFORE the Trustee prays for entry of an order sustaining the Trustee's Objection to the Debtor's Amended Exemptions, and striking the Debtor's Amended Exemptions from the record.

DATED: November 10, 2016

/s/Timothy J. Miller, attorney
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
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GOMOLAK, DENISE M.,	Case No. 14-41137 PJS Chapter 7
Debtor(s)	Hon. Phillip J. Shefferly

______________________/

proposed

ORDER REGARDING

TRUSTEE'S OBJECTION TO DEBTOR'S AMENDED EXEMPTIONS

The Trustee filed an objection to the Debtor's Amended Exemptions. Service was proper and there was no response and no request for hearing. The Court being otherwise advised,

IT IS HEREBY ORDERED that the Trustee's Objection to the Debtor's Amended Exemptions is sustained.

IT IS FURTHER ORDERED that the Debtor's Amended Exemptions are hereby stricken from the record.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the Matter of:	In Bankruptcy
GOMOLAK, DENISE M.,	Case No. 14-41137 PJS Chapter 7
Debtor(s) /	Hon. Phillip J. Shefferly

NOTICE OF TRUSTEE'S OBJECTION TO DEBTOR'S AMENDED EXEMPTIONS

Schneider Miller, P.C., attorneys for Timothy J. Miller, Trustee, has filed papers with the court entitled Trustee's Objection to Debtor's Amended Exemptions.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to the relief as set forth above, or if you want the court to consider your views on the motion within twenty one (21) days, you or your attorney must:

1. File with the court a written response or an answer, (must comply with F. R. Civ. P. 8(b), (c) and (e)) explaining your position at:

United States Bankruptcy Court
211 W. Fort Street
Detroit, Michigan 48226

If you mail your response to the court for filing, you must mail it early enough so the court will receive it on or before the date stated above.

You must also mail a copy to:
Timothy J. Miller
64541 Van Dyke, Suite 101
Washington, Michigan 48095

2. If a response or answer is timely filed and served, the clerk will schedule a hearing on the motion and you will be served with a notice of the date, time and location of the hearing.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion and may enter an order granting the relief.

Dated: November 10, 2016

/s/ Timothy J. Miller, attorney
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UNITED STATES BANKRUPTCY COURT
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______________________/

CERTIFICATE OF SERVICE

RE: Trustee's Objection to Debtor's Amended Exemptions, Brief in Support, Proposed Order, L.B.R. 9014-1 (E.D.M.), Notice and Certificate of Service.

I hereby certify that on November 10, 2016, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will forward such filing to the Office of the United States Trustee and all counsel of record using the ECF system, and further that such papers were deposited to and approved mail depository, postage prepaid, first class, United States Postal Service, to:

William Babut
Babut Law Offices
700 Towner St.
Ypsilanti, MI 48198

Denise Gomolak
7295 Streamwood Dr.
Ypsilanti, MI 48197

Dated: November 10, 2016

/s/ Timothy J. Miller, attorney
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